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No. 83-1437

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,
Petitioners,

v.

ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties [1] in support of the petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondis-

[1] Their consents have been filed with the Clerk of the Court.

criminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—*i.e.*, whether the defendants are required to pay, under 42 U.S.C. § 1988, the plaintiff's attorney's fees that were incurred after a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure was rejected.

Because of its interest in the interpretation and operation of Rule 68 and 42 U.S.C. § 1988 and other attorney's fee provisions, EEAC filed amicus curiae briefs in this court in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The petitioners are police officers of the Village of Berkley, a municipal corporation in Cook County, Illinois, who were named as defendants in this civil action filed pursuant to 42 U.S.C. § 1983.[2] During the pendency of this suit in the district court, petitioners submitted to respondent an offer of judgment under Rule 68[3] of the Federal Rules of Civil Procedure which read as follows:

> Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki

[2] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3] Rule 68 reads in relevant part as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* (Emphasis added).

> and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand ($100,000) Dollars. (Joint Appendix A-17).

The offer was refused by plaintiff Chesny, the case proceeded to trial, and the jury returned a verdict in favor of Chesny for $60,000. The parties stipulated that Chesny's costs and attorney's fees incurred prior to the Rule 68 offer were $32,000. Petitioners paid this amount to Chesny. Chesny filed a post-trial motion under 42 U.S.C. § 1988[4] seeking approximately $171,000 in additional fees for work performed after the offer was rejected. The petitioners objected to the payment of fees incurred after the rejection of their offer of judgment.

The district court, in an opinion reported at 547 F. Supp. 542 (N.D. Ill. 1982) (Shadur, J.), held that Chesny could not recover costs, including attorney's fees, incurred after the offer of judgment. In doing so, the court stated that "[b]ecause Section 1988 specifies attorneys' fees are awarded as part of 'costs,' it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case." 547 F. Supp. at 547. In addition, the court reasoned that denying attorney's fees to the plaintiff who declined the offer of judgment

[4] 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976, reads in relevant part as follows:

> In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, *a reasonable attorney's fee as part of the costs.* (Emphasis added).

would promote the policy of encouraging settlements. *Id.*

The court of appeals, in an opinion reported at 720 F.2d 474 (7th Cir. 1983), concluded "that the form of offer in this case is valid." 720 F.2d at 478. The Seventh Circuit, however, reversed the district court, holding that the Rule 68 requirement that the plaintiff pay "costs" did not prevent the award of attorneys fees to the plaintiff who "prevailed" in the lawsuit, even though the amount recovered was less than the offer. The court determined that to include attorney's fees within the meaning of "costs" under Rule 68 would undermine Congressional policy under § 1988 of awarding attorney's fees to prevailing parties under the civil rights statutes. *Id.*

SUMMARY OF ARGUMENT

A plain reading of Rule 68 and Section 1988, the understanding of the drafters of the two provisions, and the better reasoned lower court decisions all support a cut-off of attorney's fees incurred after a Rule 68 offer of judgment is rejected. Any other reading of Rule 68 and Section 1988 would greatly undermine the effectiveness of Rule 68 in promoting settlement and avoiding protracted litigation.

Rule 68 mandates that if the judgment obtained is not more favorable than a rejected offer of judgment, the offeree *must* pay the costs incurred after the rejection. Since Section 1988 provides for an award of attorney's fees "as part of the costs," Rule 68 should be read to prohibit the recovery of costs, including attorney's fees, incurred after an offer of judgment is rejected.

A number of well known and widely used provisions of federal law that allowed attorney's fees "as part of the costs" were in effect when Rule 68 was adopted. Thus, Congress was aware that attorney's fees could be included as "costs" within the meaning of Rule 68. Since Congress intended attorney's fees under Section 1988 to be treated as any other items of costs, Rule 68 should be read to prohibit an award of fees after an offer is rejected.

A rule that cuts off attorney's fees after an offer of judgment is rejected is consistent not only with the purpose of Rule 68, but also with the policies underlying Section 1988 which are to assure access to the federal courts, but to award fees only for the successful efforts of counsel. No policy under Section 1988 is served by awarding attorney's fees for work incurred after an offer of judgment is rejected where the additional efforts resulted in a less favorable recovery than the offer.

ARGUMENT

I. A PLAINTIFF WHO RECOVERS LESS THAN THE AMOUNT CONTAINED IN A VALID OFFER OF JUDGMENT UNDER RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE MAY NOT RECOVER ATTORNEY'S FEES INCURRED AFTER THE REJECTION OF THE OFFER.

Rule 68 of the Federal Rules of Civil Procedure provides that a plaintiff who rejects an offer of judgment and obtains a judgment "not more favorable" than the offer "*must* pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68 (emphasis added). The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988,[5] provides that a reasonable

[5] See note 4, *supra*.

attorney's fee may be awarded to a prevailing plaintiff in an action under 42 U.S.C. § 1983 "as part of the costs." The plain reading of the two provisions, the understanding of the drafters of Rule 68 and the legislative history of Section 1988, and the better reasoned lower court decisions support a rule that prohibits a plaintiff from recovering attorney's fees incurred after a Rule 68 offer is rejected. Any other reading of the interplay between Rule 68 and Section 1988 would greatly undermine the effectiveness of Rule 68 in promoting settlement and preventing protracted litigation.

Since its adoption in 1938, Rule 68 has been widely recognized as "a simple and effective means to discourage the continuation of unnecessary litigation."[6] A contemporary commentator noted that Rule 68 "might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers." Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304 n.195 (1939).

Similarly, the Advisory Committee on the 1946 Amendments to Rule 68 stated that the rule "should serve to encourage settlements and avoid protracted litigation." Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments*, 5 F.R.D. 433, 483 n.1 (1946); *see also* 12 C. Wright and A. Miller, *Federal Practice and Procedure*,

[6] Note, *Delta Air Lines, Inc. v. August: Taking the Teeth Out of Rule 68*, 43 U. Pitt. L. Rev. 765 (1982). It also has been noted that Rule 68 "represents a formidable settlement tactic." *Greenwood v. Stevenson*, 88 F.R.D. 225, 226 (D.R.I. 1980).

§ 3001, p. 56 (1973); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 68.02, p. 68-4 (1984).[7] In *Staffend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969), the district court noted that:

> Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue. The provision in the rule which imposes costs upon a party who refuses an Offer of Judgment and who later recovers no more than the offer also puts teeth in the rule and makes it effective by encouraging acceptance.

This Court recognized in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) that "[t]he purpose of Rule 68 is to encourage the settlement of litigation." *See also, id.*, at 378 ("the intent of the rule . . . is to encourage settlement") and 379 n.5 ("the purpose behind Rule 68, which this case involves, is to promote *settlement* and thereby diminish the number of trials necessary to resolve the cases which are filed in the federal courts.").

Rule 68 itself is stated in mandatory language. It states that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." (Emphasis added) Numerous courts

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[7] It has been noted that Rule 68 constitutes a "deliberate and calculated means by which to encourage defendants to employ offers of judgment, and thus accomplish the ultimate end of averting unnecessary litigation." Note, *Delta Airlines, Inc. v. August : Taking the Teeth Out of Rule 68, supra*, 43 U. Pitt. L. Rev. at 770.

and commentators have noted the mandatory nature of the language of Rule 68. *See, e.g., Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y 1974) ("It cannot be questioned that the rule itself is couched in mandatory terms"); *Note, Delta Air Lines, Inc v. August: The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 610 (1983) ("Unlike Rule 54(d), Rule 68 is couched in semantically mandatory terms"). It is well recognized that "the word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may.'" *Berg v. Merchant*, 15 F.2d 990, 991 (6th Cir. 1926), *cert. denied*, 274 U.S. 738 (1927). Thus, it cannot reasonably be disputed that a plaintiff who rejects a Rule 68 offer and recovers less than the offer *must* pay the costs incurred after the offer. Thus, if attorney's fees are construed to be "costs" within the meaning of Section 1988, Rule 68 would mandate that such fees incurred after an offer is rejected may not be recovered.

The Attorney's Fees Awards Act treats fees as a component of costs. Section 1988 reads in pertinent part as follows:

> In any action or proceeding to enforce a provision of [§ 1983], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs*. (Emphasis added)

The district court in this case reasoned that since Section 1988 includes attorney's fees "as part of the costs," Rule 68 mandated that attorney's fees incurred after the rejection of an offer were not recoverable. The court stated that "[b]ecause Section

1988 specifies attorney's fees are awarded as part of 'costs,' it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case." 547 F. Supp. at 547. Although it conceded that the district court's approach was "in a sense logical," the Seventh Court held that the district court erred in its "rather mechanical linking up of Rule 68 and section 1988." 720 F.2d at 478. It is submitted that the district court's reading of the interplay between Rule 68 and Section 1988 is supported not only by a plain reading of the rule and statute, but also by the better reasoned decisions of the lower courts.

Rule 1 of the Federal Rules of Civil Procedure states that "[t]hese rules govern the procedure in the United States district courts in *all* suits of a civil nature whether cognizable as cases at law or in equity." (Emphasis added) It is well established that the Federal Rules of Civil Procedure have the force of a federal statute, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and that a court should strive to adopt the construction of a statute that reconciles it with other statutory provisions. *See Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974); *Heiden v. Cremin*, 66 F.2d 943, 946 (8th Cir.), *cert. denied*, 290 U.S. 687 (1933). The interpretation of Rule 68 and Section 1988 that is most consistent with the plain meaning and purposes of the provisions is that of the Sixth Circuit in *Fulps v. City of Springfield, Tenn.*, 715 F.2d 1088, 1092-93 (6th Cir. 1983), where the court stated that:

> When Congress drafted 42 U.S.C. § 1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required, as we are, to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs.

It is submitted that the court's conclusion in *Fulps* "that the term 'costs,' as used in Rule 68, should be read to include attorney's fees, where fees are authorized by the substantive statute at issue in the litigation," 715 F.2d at 1095, is correct.

A number of other courts that have considered the issue have determined that attorney's fees under section 1988 or other civil rights fee provisions should be considered to be "costs" within the meaning of Rule 68. For example, in *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 114 (N.D. Cal. 1979), the court held that "an offer, if it exceeds the judgment finally obtained, bars the recovery of the relevant fees." The court in *Waters* also noted that:

> [T]he relevant statutory fees provisions authorize the award of fees *as part of costs*. To award fees for time expended during a part of the case for which the Rule absolutely precludes the award of costs . . . would stand the Rule on its head. *Id.* at 115.

Similarly, in *Bitsouni v. Sheraton Hartford Corp.*, 33 FEP Cases 898, 902 (D. Conn. 1983), the court, after noting "a trend towards using fee-shifting to promote settlement," *id.* at 901, held that a plaintiff who recovered less than a rejected offer of judgment

may not recover his attorney's fees incurred after the rejection. *See also Lyons v. Cunningham*, 583 F. Supp. 1147, 1157 (S.D.N.Y. 1983) ("the majority of cases and the more reasoned view in the Court's opinion supports defendant's contention that in a civil rights action attorneys' fees are costs for the purposes of Rule 68"); *Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 734 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1978) (Swygert, dissenting) ("If a plaintiff's settlement demands are unreasonable, a defendant may make an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Once a defendant makes such an offer, he is not liable for plaintiff's costs and attorney's fees if plaintiff does not ultimately recover the amount of the offer"). Finally, a leading treatise on employment discrimination law has stated that "[i]f the plaintiff does not recover a more favorable judgment than the offer, the plaintiff is not entitled to attorney's fees incurred after the date of the offer." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1530 (2d Ed. 1983).[8]

In reaching its decision, the Seventh Circuit implied that "costs" under Rule 68 should not be read

[8] Lower court decisions in *Gamlen Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), *Cruz v. Pacific Am. Ins. Corp.*, 337 F.2d 746 (9th Cir. 1964) and *Greenwood v. Stevenson*, 88 F.R.D. 225 (D. R.I. 1980), do not support a contrary result. Each of these cases involved the issue of whether a defendant intended to include attorney's fees in the offer of judgment. Thus, the issue of the effect on fees of a rejected offer was not the dispositive issue in these cases. As such, these decisions provide neither support for the Seventh Circuit's decision nor guidance to this Court.

to include attorney's fees because "[t]he award of attorney's fees to prevailing plaintiff's was uncommon in 1938, although not unknown." 720 F.2d at 477. This reading of Rule 68, however, ignores the numerous statutes in effect in 1938, when Rule 68 was enacted, that contain language similar to Section 1988. For example, Section 40 of the Copyright Act of 1909, 17 U,S.C. § 40 (1940 ed.), provided that a court was empowered to "award to the prevailing party a reasonable attorney's fee as part of the costs." *See also* 15 U.S.C. § 15 (1914); 15 U.S.C. § 77(k); 7 U.S.C § 210(f) (1921), among numerous others set forth in petitioners' brief. It is clear that at the time Rule 68 was adopted, there were a number of well known and widely used provisions of federal law that allowed attorney's fees to be awarded "as part of the costs." Thus, the implication of the Seventh Circuit's decision in this case that the drafters of Rule 68 would not have envisioned attorney's fees being included as part of "costs" is refuted by the numerous statutes in effect in 1938 that contained language virtually identical to section 1988. In addition, as previously stated, the plain meaning of the statutory language indicates that Congress defined "costs" as including attorney's fees.

This Court noted in *Hutto v. Finney*, 437 U.S. 678, 697 (1978), that "[t]here is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs." In that case, the Court also recognized that "there are a large number of statutory and common-law situations in which allowable costs include counsel fees." *Id.* The legislative history of Section 1988 clearly recognizes that

attorney's fees under Section 1988 should be treated as other items of costs. For example, the Senate Report on Section 1988 stated that:

> [I]t is intended that the attorneys' fees, *like other items of costs*, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted and emphasis added), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

Thus, it is apparent that Congress intended attorney's fees under Section 1988 to be treated as other items of costs. Congress was aware that Rule 68 prevents the recovery of "costs" incurred after an offer of judgment is rejected. Given this awareness and its intent that attorney's fees would be treated "like other items of costs," it is clear that the result of the Seventh Circuit herein is inconsistent not only with a plain reading of Rule 68 and Section 1988, but also with the Congressional intent underlying the enactment of Section 1988.

In reaching its decision, the Seventh Circuit relied heavily on this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), which held that "costs," as used in 28 U.S.C. § 1927, did not incorporate the definition of costs used in Title VII. In *Roadway Express*, the Court concluded that 28 U.S.C. § 1927 was intended by Congress to include only those "costs" specified in 28 U.S.C. § 1920, which did not include attorney's fees. As Justice

Powell, the author of the *Roadway Express* opinion, later noted:

> In this case [*Delta Air Lines, Inc. v. August*], by contrast, the entitlement to "costs," including an attorney's fee, arises under Rule 68 of the Federal Rules of Civil Procedure. In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. *Delta Air Lines, Inc. v. August*, 450 U.S. at 463 n2.

After analyzing the *Roadway Express* decision and Justice Powell's explanation in *Delta Air Lines*, the Sixth Circuit in *Fulps v. City of Springfield, Tenn.*, 715 F.2d at 1095, concluded "that the *Piper* decision does not preclude our conclusion here that the term 'costs,' as used in Rule 68, should be read to include attorney's fees where fees are authorized by the substantive statute at issue in the litigation." It is submitted that the Sixth Circuit's reading of *Roadway Express* is correct and should be adopted by this Court.

A plain reading of the interplay between Rule 68 and Section 1988 and the understanding of the framers of the two provisions are entirely consistent with the petitioners' interpretation urged herein. Thus, in the absence of some overriding interest in excepting Section 1988 from the normal operation of Rule 68, Rule 68 requires a cut-off of costs, including attorney's fees, following a rejection of an offer of judgment. As set forth in part II, below, not only is there no overriding policy reason for excepting section 1988 from the operation of Rule 68, there are compelling policy reasons for not doing so.

II. A RULE PROHIBITING A PLAINTIFF FROM RECOVERING ATTORNEY'S FEES AFTER A RULE 68 OFFER IS REJECTED IS CONSISTENT WITH THE PURPOSE OF RULE 68 AND DOES NOT CONFLICT WITH THE POLICIES UNDERLYING SECTION 1988.

The decision of the district court herein cutting off attorney's fees after the rejection of an offer of judgment was reversed by the Seventh Circuit because it "puts Rule 68 into conflict with the policy behind Section 1988." 720 F.2d at 478. The Seventh Circuit reasoned that the denial of attorney's fees after an offer is rejected would require a plaintiff to "think very hard," *id.* at 479, before rejecting an offer. The purpose of Rule 68, however—to require *both* sides to undertake a realistic assessment of their positions and to promote settlement and avoid protracted litigation—is no less important in civil rights cases than it is in other civil actions. As set forth below, an approach cutting off attorney's fees after an offer is rejected is the only way in which the important goals of Section 1988 can be reconciled with the equally important purposes behind Rule 68.

Justice Powell, in his opinion in *Delta Air Lines*, 450 U.S. at 363, recognized the importance of settlement when he stated that "parties to litigation and the public as a whole have an interest—*often an overriding one*—in settlement rather than exhaustion of protracted court proceedings" (emphasis added).[9]

[9] This Court has recognized on other occasions that there exist strong policy reasons favoring the compromise and settlement of litigation, including the cost and drain on judicial resources that are spared by such settlements. *See, e.g., Williams v. First National Bank*, 216 U.S. 582, 595 (1910). This policy favoring compromise and settlement is particularly strong in employment discrimination cases, where both Congress and the courts clearly have recognized that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 103 S.Ct. 2177, 2186 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It should be noted that many of the decided cases involving Rule 68 offers have contained allegations of employment discrimination or other civil rights violations.

As set forth in part I, above, the drafters of Rule 68 intended it to serve this "overriding purpose" of promoting settlement. A reading of Rule 68 which would preclude an award of attorney's fees for work incurred after an offer of judgment is rejected promotes the purpose of Rule 68 by requiring *both* parties to realistically assess the lawsuit to determine whether the case can be resolved short of litigation. As one commentator has noted:

> Unless 'costs' is interpreted to include not only taxable costs but also attorney's fees . . . rule 68 will remain an ineffective weapon in the litigator's arsenal. When, however, the 'costs' provision is read to include the attorney's fees of the plaintiff, rule 68 becomes a dynamic tool in litigation, fulfilling the purpose of encouraging settlement in cases involving statutorily authorized attorney's fees without sacrificing the high ideals of those statutes. Note, *Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68*, 16 Ga. L. Rev. 482, 486 (1982) (hereinafter "*Offer of Judgment*").

The interest of the plaintiff in an early settlement cannot be discounted. An interpretation of Rule 68

that would cut off a defendant's liability for attorney's fees provides a strong incentive to a defendant to extend Rule 68 offers and provides a plaintiff a quicker means of recovery than normally is available in protracted federal suits. *Cf. Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982). On the other hand, as one commentator has noted, "[i]f fees are not defined as 'costs,' counsel may be tempted to place his interest above that of the client and reject a reasonable offer of judgment solely with the hope of recovering greater fees." *Offer of Judgment*, 16 Ga. L. Rev. at 499. Thus, it is apparent that the rule advocated herein is consistent with and would promote the purposes underlying Rule 68.

"The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)." *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1937 (1983). Accordingly, this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam). In *Hensley v. Eckerhart*, 103 S.Ct. at 1941, however, this Court held that attorney's fees awards must take into account the degree of success of the lawsuit. As discussed below, a rule that cuts off attorney's fees incurred after the rejection of a Rule 68 offer is consistent with these important policies underlying Section 1988.

As noted above, the award of pre-offer attorney's fees to a prevailing party is consistent with the policies underlying Section 1988 since it serves to encourage the enforcement of the civil rights laws by competent counsel. No policy under Section 1988, however, is served by awarding fees incurred after an offer of judgment is rejected. As the court noted in *Waters v. Heublein, Inc.*, 485 F. Supp. at 114-15:

> Rule 68 is designed to prevent needless litigation by punishing a party that chooses to reject a reasonable settlement offer. Awarding fees covering their pre-offer work to attorneys who settle cases through acceptance of an offer of judgment advances the purposes underlying the fees provision. On the other hand, applying Rule 68 to bar the recovery of post-offer fees in a case in which a party has rejected a reasonable offer that ultimately exceeds the judgment does not unduly interfere with the operation of this provision. Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation (footnote omitted).

As one commentator has noted, "to refuse to award fees to an attorney whose mistaken judgment and rejection of an offer of judgment resulted not in a more favorable recovery but rather in a less favorable one does not contravene the purpose of these statutes." *Offer of Judgment*, 16 Ga. L. Rev. at 504.

A cut off of attorney's fees *after* an offer of judgment is rejected also is consistent with this Court's

decision in *Hensley v. Eckerhart*, 103 S.Ct. 1933. In *Hensley*, the Court stated that:

> Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained. Id.* at 1941 (emphasis added).

Thus, in the instant case, a cut off of attorney's fees after the offer was rejected is entirely consistent with *Hensley* since the work performed after the offer produced *no* more favorable recovery and in fact resulted in a less favorable recovery than the offer. That the plaintiff "prevailed" in the suit is not a sufficient reason for granting post-offer fees since no additional relief was obtained as a result of counsel's post-offer efforts. As this Court noted in *Hensley*, 103 S.Ct. at 1941, "[t]hat the plaintiff is a 'prevailing party' therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." [10]

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[10] The district court in *Neal by Neal v. Berman*, 576 F. Supp. 1250, 1253 (E.D. Mich. 1983), acknowledged this limitation on a plaintiff's right to fees as follows:

> The Court's reasoning in this opinion will have the obvious and intended effect of encouraging defendants in civil rights cases to make reasonable settlement offers, and to memorialize those offers on record. Plaintiffs in such cases will then be compelled to take a hard look at the expected result of their lawsuit. *A plaintiff who unreasonably overestimates the likelihood of success and probable amount of recovery, and thereby pushes his case to trial, should not be able to transfer the costs of the trial to the defendant, because those costs were not necessarily incurred in securing the desired result.* (Emphasis added)

As noted above, this Court has held that a prevailing plaintiff ordinarily should recover attorney's fees "unless special circumstances would render such an award unjust." *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 416-17; *Newman v. Piggie Park Enterprises*, 390 U.S. at 402. It is submitted that the rejection of a Rule 68 offer and the ultimate recovery of less than the offer constitutes "special circumstances" that provide additional support for cutting off post-offer fees.

The Seventh Circuit herein feared that attorneys might "be deterred from bringing good faith actions to vindicate fundamental rights," 720 F.2d at 479, if attorney's fees are not available for work done after an offer is rejected. It is clear, however, that a rule providing for a cut off of attorney's fees after a rejected offer of judgment will not prevent or unduly discourage plaintiffs from pursuing civil rights actions. As the Supreme Court of Alaska has noted:

> Rule 68 does not stop anyone from filing a lawsuit. It is designed to encourage reasonable settlements after the lawsuit is filed. *Scott v. Robertson*, 583 P.2d 188, 195 (Alaska 1978).

All Rule 68 requires a plaintiff to do is to make a realistic assessment of the value of the lawsuit and to accept or reject a defendant's offer on the basis of that assessment.

Finally, it must be borne in mind that this case involves not only the interplay between Rule 68 and Section 1988, but also numerous fee-shifting statutes. The Seventh Circuit in its opinion stated that federal statutes allowing attorney's fees in the mid-1970's "range from 75 to 90." 720 F.2d at 477. It is submitted that a reading of Rule 68 that does not pro-

vide for a cut off of attorney's fees after an offer is rejected will have the practical effect of rendering Rule 68 of no practical value in any case were attorney's fees are provided for. It is highly doubtful that the drafters of Rule 68 could have intended such a result.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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